(27,486)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 731.

J. J. DILLON, APPELLANT,

vs.

R. W. GLOSS, DEPUTY COLLECTOR OF UNITED STATES INTERNAL REVENUE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1920.

a In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 16763.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector United States Internal Revenue, Respondent.

1 In the Southern Division of the United States District Court for the Northern District of California, First Division.

16763.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector United States Internal Revenue, Respondent.

Præcipe for Transcript on Appeal.

To the Clerk of said Court:

Please prepare transcript on appeal, to include the following papers:

1. Petition for writ of habeas corpus.
2. Motion to strike out.
3. Demurrer.
4. Orders refusing writ of habeas corpus and dismissing petition for writ.
5. Judgment.
6. Opinion of Judge Frank H. Rudkin.
7. Petition for appeal and order allowing same.
8. Assignment of Errors.
9. Appeal bond.
10. Notice of Appeal.
11. Citation on appeal.

THEODORE A. BELL,
Attorney for Petitioner.

Receipt of a copy of the above Præcipe is hereby admitted this 28th day of January, 1920.

ANNETTE ABBOTT ADAMS,
Attorney for Respondent.

2 (Endorsed:) Receipt of a copy of the within Præcipe is hereby admitted this 28th day of January, 1920. Annette Abbott Adams, Attorney for Respondent. Filed Jan. 28, 1920. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

3 In the Southern Division of the United States District Court for the Northern District of California, First Division.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector United States Internal Revenue, Respondent.

Petition for Writ of Habeas Corpus.

To the Honorable District Court of the United States for the Northern District of California, Southern Division:

The petition of J. J. Dillon respectfully shows:

I.

That your petitioner is unlawfully detained and restrained of his liberty by the above named respondent, and that such unlawful restraint and detention, and the claim or authority by virtue of which such detention and restraint is made, consists of the following, to-wit:

(*a*) The respondent now is, and at all times since January 2, 1920, has been the duly appointed, qualified and acting Deputy Collector of U. S. Internal Revenue in and for the State of California, and duly commissioned by the President of the United States to enforce in said State the provisions of Titles
4 II. and III. of that certain Act of Congress of October 28, 1919, and entitled the "National Prohibition Act."

(*b*) That for more than one year last past D. W. Keating has been, and now is, engaged in a general drayage business in the City and County of San Francisco, for hire, under the firm name and style of Keating Drayage Co., and for sometime past your petitioner has been engaged by said Keating in said business.

(*c*) On January 17, 1920, there was delivered to said Drayage Company, at No. 563 Green Street, San Francisco, by the owner thereof, for carriage to said owner at No. 1 Vicksburg Street, in said city, one cask or barrel of wine containing about 27 gallons, which

wine contained not more than fourteen per centum of absolute alcohol reckoned by volume and not by weight, and more than one-half of one per cent by volume, and fit for use for beverage purposes.

(*d*) At the time said wine was delivered to said Drayage Company, as aforesaid, said Drayage Company made a permanent record thereof showing in detail the amount and kind of said liquor, together with the name and address of said consignor and consignee thereof, said consignor and consignee being one and the same person and the owner of said wine, and the time and place of the carriage thereof.

(*e*) On the outside of said package containing said wine, at the time the same was delivered by the owner thereof to said Drayage Company for such carriage aforesaid, and at the time of the arrest of your petitioner, as hereinafter particularly alleged, there appeared the following information, to wit: the name and address of the consignor and the name and address of the consignee, both being the same person and the owner of said wine as aforesaid, and the kind and quantity of liquor contained in said package.

5 (*f*) At the time said wine was delivered to said Drayage Company, and at all times thereafter, the federal tax imposed by law thereon had been paid by securing and affixing to said cask or barrel wine tax stamps equal to sixteen per cent for each and every gallon of wine contained in said cask or barrel, all of which stamps were duly cancelled.

(*g*) After the delivery of said wine to said Drayage Company as aforesaid, your petitioner, as such employe of said Drayage Company, proceeded to carry said wine, upon one of the trucks of said Drayage Company, from the point of delivery to said No. 563 Green Street, San Francisco, but while your petitioner was so carrying the same upon one of the public streets of San Francisco, respondent wrongfully and unlawfully arrested petitioner under the claim that the carriage and moving of said wine in the circumstances aforesaid was a violation of the provisions of Titles II. and III. of said National Prohibition Act, and particularly a violation of section 26 of Title II. thereof, and since said arrest, respondent has wrongfully and unlawfully detained and restrained, and does now wrongfully and unlawfully detain and restrain your petitioner under
6 such claim and authority, and not otherwise, and the respondent also claims that the Eighteenth Amendment to the United States Constitution and all of the provisions of Titles II. and III. of said National Prohibition Act became effective at midnight January 16, 1920, and thereafter were and are in full force and effect, and respondent attempts to justify his arrest and detention of your petitioner upon the ground that said National Prohibition Act was in full force and effect at the time your petitioner was arrested, and that your petitioner in attempting to carry and move said wine as aforesaid was subject to arrest and detention under and by virtue of the terms and provisions of said Act.

II.

Your petitioner further further avers that on or about the first day of August, 1917, the Congress of the United States attempted to propose a purported amendment to the Constitution of the United States, in the language following, to wit:

"Resolved by the Senate and House of Representatives, that the following amendment to the Constitution be, and hereby is, proposed to the Senate, to become valid as a part of the Constitution when ratified by the Legislatures of the Several States, as provided by the Constitution:

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and several States have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided by the Constitution within seven years from the date of the submission thereof to the States by the Congress.

7 Your petitioner alleges and asserts that the several States of the Federal Union, including the State of California, have never granted or surrendered the right to so amend the Constitution of the United States, or to amend said Constitution in such manner as to deprive the States, or the State of California, of their police power to regulate or prohibit the transportation of intoxicating liquors, nor do the United States of America, or the people thereof, possess the power, in or by virtue of said Eighteenth Amendment, or otherwise, to restrain or prevent said Drayage Company from carrying, for hire, the intoxicating liquor, or any other property of another, or to regulate or attempt to regulate the business of said Drayage Company in carrying wines or other liquor for others, and especially where the ownership of intoxicating liquor is not prohibited, or attempted to be prohibited, by law.

III.

Petitioner further alleges that even if the Eighteenth Amendment to the Federal Constitution is a valid amendment to the Constitution of the United States, or said National Prohibition Act is a valid enactment of the United States Congress, neither said amendment nor said act has yet become effective, and in that behalf petitioner avers that on January 29, 1919, the Department of State caused to be issued, promulgated and published the following proclamation, towit:

"To all to whom these presents shall come, greeting:

Know ye that the Congress of the United States, at the second session, Sixty-fifth Congress, begun at Washington on the third day of December, in the year one thousand nine hundred and seventeen, passed a resolution in the words and figures following, towit:

Joint resolution, proposing an amendment to the constitution of the United States:

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), that the following amendment to the Constitution be, and hereby is proposed to the States to become valid as a part of the constitution when ratified by the Legislatures of the several States as provided by the constitution.

Section One. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof, into or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section Two. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section Three. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the Legislatures of the several States, as provided in the constitution, within seven years from the date of the submission hereof to the States by the Congress.

And further, that it appears from official documents on file in this department that the amendment to the constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

And further, that the States whose Legislatures have so ratified the said proposed amendment constitute three-fourths of the whole number of states in the United States.

Now, therefore, be it known that I, Frank L. Polk, Acting Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 29th day of January, in the year of our Lord one thousand, nine hundred and nineteen.

(Signed) FRANK L. POLK,
Acting Secretary of State."

Petitioner alleges that said proclamation, at all times has been, and now is, null and void, in that the legislatures of the States of
9 Washington, Ohio, California, Nebraska, Colorado and Oklahoma had not ratified said purported amendment at the time said proclamation was so promulgated and published, and that the Department of State has never attempted to issue, promulgate or publish any other proclamation respecting the ratification of said Eighteenth Amendment, and your petitioner further avers that on January 17, 1920, the legislatures of at least three-fourths of the States had not ratified said Amendment, and said Amendment has not yet become a part of the Constitution of the United States, nor has one year elapsed since the ratification of said Eighteenth Amendment by the necessary three-fourths of the several States.

IV.

Your petitioner avers that said arrest and detention of your petitioner by the respondent deprives your petitioner of his liberty without due process of law, secured to him by the Fifth Amendment to the United States Constitution.

V.

That your petitioner at all times herein mentioned was, and now is, a citizen of the United States and of the State of California.

Wherefore, your petitioner prays that a writ of habeas corpus issue herein, directed to said respondent, commanding him to have the body of your petitioner before this honorable Court, or a Judge thereof, at a time and place therein to be specified, to do and receive what it shall then be considered by this Court, or a Judge thereof, concerning your petitioner, together with the time and cause of said detention, and said writ, and that your petitioner may be restored to his liberty.

J. J. DILLON,
Petitioner.

THEODORE A. BELL,
Attorney for Petitioner.

10 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. J. Dillon being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief, and as to those matters, he believes it to be true.

J. J. DILLON.

Subscribed and sworn to before me this 17th day of January, 1920.

LYLE S. MORRIS. [SEAL.]
Deputy Clerk, U. S. District Court,
Northern District of California.

(Endorsed:) Filed Jan 17, 1920. W. B. Maling, Clerk, by Lyle S. Morris, Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16762.

J. J. DILLON, Petitioner,

vs.

E. W. Gloss, Deputy Collector United States Internal Revenue, Respondent.

Motion to Strike Out.

Comes now E. W. Gloss, respondent herein, by his attorney, Annette Abbott Adams, United States Attorney for the Northern District of California, and moves to strike out the following portions of the petition on file herein:

All those portions of said petition contained in paragraph I following line 31, page 3, of said petition, commencing "and the respondent also claims"; and all of paragraphs II and III of said petition, upon the following grounds:

That said portions of said petition are irrelevant and an attempt to raise questions not within the jurisdiction of this court, in that they are a direct attack upon the Constitution of the United States, and upon the legislative enactments of the various States of the United States in ratifying the eighteenth amendment to the Constitution of the United States.

That all of said allegations are redundant and surplusage and not proper to the support of a petition for writ of habeas corpus.

12 That this Court has not jurisdiction to hear or determine questions attempted to be raised by said allegations in that said questions attempted to be so raised are purely political in their nature and entirely within the control and within and province of the legislative branch of the Government of the United States, and the several states thereof.

Said motion will be made upon all the records and papers on file herein.

Dated January 23rd, 1920.

ANNETTE ABBOTT ADAMS,
United States Attorney;
E. M. LEONARD,
Assistant U. S. Attorney,
Attorneys for Respondent.

(Endorsed:) Filed Jan. 23, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

13 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16763.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector of United States Internal Revenue, Respondent.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now respondent herein by his attorney Annette Abbott Adams, United Attorney for the Northern District of California, and demurs to the petition for writ of habeas corpus on file herein on the following grounds, to wit:

I.

That said petition does not state facts sufficient to entitle petitioner to the relief therein prayed for.

II.

That the guilt of said petitioner is admitted by the allegations of said petition.

III.

That the authority for the detention of the petitioner is admitted by the allegations of said petition.

IV.

That this Court has not jurisdiction to hear and determine the points other than those admitted, which are attempted to
14 be raised in said petition, in that:

Said petition attempts to raise a purely political question, and a question, decision of which is not within the province of the judicial department of the Government;

Said petition attempts to directly attack the Constitution of the United States and the validity thereof;

Said petition attempts to attack the validity of the acts of the various Legislatures of the several States of the United States which have ratified the eighteenth amendment to said Constitution.

Wherefore, respondent prays that said Petition for Writ of Habeas Corpus be denied.

ANNETTE ABBOTT ADAMS,
United States Attorney;
E. M. LEONARD,
Assistant U. S. Attorney,
Attorneys for Respondent.

(Endorsed:) Filed Jan. 23, 1920. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

15 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, held at the Court-room thereof, in the City and County of San Francisco, State of California, on Friday, the 23rd day of January, in the year of our Lord One Thousand, Nine Hundred and Twenty.

Present: The Honorable Frank H. Rudkin, District Judge.

No. 16763.

In the Matter of J. J. DILLON, on Habeas Corpus.

(Order Submitting Motion to Strike Out Portions of Petition, and Demurrer to Petition.)

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Theo. A. Bell, Esq., was present on behalf of petitioner and detained. E. M. Leonard, Esq., Assistant United States District Attorney, was present on behalf of respondent. Respondent presented and filed a Demurrer to Petition and Motion to Strike Out Certain Parts of said Petition. After argument by the respective attorneys, the Court ordered that said matter be submitted on Points and Authorities to be filed by January 26, 1920. The detained herein having been this day surrendered into custody from whence taken, the Court ordered that he go at large upon his own recognizance until the further order of this Court.

16 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16763.

In the Matter of the Application of J. J. DILLON for a Writ of Habeas Corpus.

(Opinion and Order Denying Petition for a Writ of Habeas Corpus.)

Theodore A. Bell, Esq., Attorney for Petitioner.

Annette Abbott Adams, United States Attorney, and E. M. Leonard, Esq., Assistant United States Attorney, Attorneys for the United States.

RUDKIN, *District Judge:*

Article V of the Constitution of the United States provides as follows:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Section 205 of the Revised Statutes provides:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the
17 amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

On the 19th day of December 1917 Congress proposed the Eighteenth Amendment to the Constitution of the United States. Section One of the Amendment prohibits the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes after one year from date of ratification. Section three provides that the article shall be inoperative unless ratified as an Amendment to the Constitution by the Legislatures of the several States as provided in the Constitution within seven years from the date of the submission to the States by Congress. On the 29th day of January 1919, the Department of State promulgated the Amendment as required by section 205 of the Revised Statutes, certifying the names of the States by which the same had been ratified thirty-six in number. Among the states thus certified were Washington and Ohio. The last section of the National Prohibition Act of October 28th 1919 provides that certain provisions of the act shall take effect and be in force from and after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect.

The petitioner is now in custody charged with a violation of one of those provisions of the last mentioned act which did not take effect, as already stated, until the same date as the Eighteenth
18 Amendment. The crime is alleged to have been committed on the 17th day of January of the present year. The petitioner claims that his restraint is illegal, first, because the Eighteenth Amendment and consequently the provision of the National Pro-

hibition act were not in force or effect on that date, and, second, because the Eighteenth Amendment itself is null and void. The claim that the Eighteenth Amendment and the act of Congress were not in force and effect on the 17th day of January of this year is based on two grounds:

First. Because, as already stated, the Department of State did not promulgate the Amendment until the 29th of January 1918, or less than one year ago; and,

Second. Because the States of Ohio and Washington had not in fact ratified the Amendment as certified by the Department of State.

The claim that the Amendment was not ratified until the Department of State caused the publication and made the certificate prescribed by section 205 of the Revised Statutes is not in my opinion well founded. What was meant by publishing the Amendment in the newspapers authorized to promulgate the laws can only be ascertained by referring back to the preceding section. The preceding section provides that the Secretary of State shall cause every law, order, resolution and vote to be published in at least three of the public newspapers printed within the United States and shall also cause one printed copy to be delivered to each Senator and Representative of the United States and two printed copies duly authenticated to be sent to the Executive authority of each State. The promulgation of a Constitutional Amendment under section
19 205 is no more essential to its validity than is the promulgation of an act of Congress under the preceding section and the former is no more the beginning of the Amendment than the latter is the beginning of the law. For, notwithstanding the requirement for promulgation, it is universally recognized that an act of Congress takes effect and is in force from the date of its passage and approval and a Constitutional Amendment is likewise in full force and effect from and after its ratification by the requisite number of States. In other words, the promulgation by the Department of State only affords prima facie evidence of ratification, and the promulgation, when made, relates back to the last necessary vote by a State Legislature. Congress might perhaps provide that the Department of State should ascertain and determine the fact of ratification and that an Amendment should not take effect until due promulgation of that determination by proclamation or otherwise, but Congress has not so provided. The second objection urged would seem easy of solution were it not for the conflicting decisions in the State Courts. Thus, in State vs. Howell, 181 Pac. 920, it was held that the resolution ratifying the Eighteenth Amendment was subject to the referendum provisions of the Constitution of the State and that the resolution therefore did not become final until after the expiration of the time allowed for filing a referendum petition, and, in case such a petition was filed, not until the final vote of the people thereon. No sufficient petition was filed, however, and no further action was taken. In the State of Ohio a similar ruling was made in Hawke vs. Smith, decided September 30th 1919, but in that

State a referendum petition was filed and the resolution ratifying the Amendment was voted down by the people at the next general election. Insofar as these decisions construe the Constit-ion of the respective States they are, of course, binding upon this Court. But insofar as they construe the Fifth Amendment to the Constitution of the United States a Federal question is involved and the decisions are not controlling here. I regret my inability to follow the decisions of the highest Court in those States, for in my opinion the correct rule is announced by the Supreme Judicial Court of Maine, in re Opinion of the Justices, 170 Atlantic page 673. The Court there said:

"As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

First, by the Legislatures of three-fourths of the several states; or,

Second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

Here, again, the State Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, through their constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote.

But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly."

The requirement of the Fifth Amendment that proposed Amendments shall be ratified by the Legislatures of three-fourths of the States or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by Congress, would seem to me preclude ratification by direct vote of the people; and the intention of the framers of the Constitution that Amendments should be ratified by the Representatives of the people, either in Legislature or in Convention, and not by the people themselves seems manifest. Had the resolution in this case provided that the Amendment should be ratified by the people of the several States by direct vote such pro-

vision would be clearly in derogation of the Constitution and void, and what Congress could not do it is needless to say the several States cannot do because full power over the matter is conferred upon the former and denied to the latter. No more in my opinion can the people of a State today ratify an Amendment to the Constitution of the United States by direct vote than could they elect a United States Senator by direct vote prior to the recent Amendment.

The term Legislature does not necessarily mean or imply the same thing at all times or in all parts of the Constitution. Thus when the Legislature of a State is referred to simply as the law making body the term may well be construed to embrace the entire law making machinery of the State including a vote of the people where authorized by the local Constitution, as in Davis vs. Ohio, 241
22 U. S. 565. But where the Legislature is designated as a mere agency to discharge some duty of a non-legislative character, such as the election of a United States Senator, or the ratification of a proposed Amendment to the Constitution, the Legislative body alone in its representative capacity may act, just as a sheriff who is designated to discharge some unofficial duty such as Jury Commissioner must act in person and may not act by deputy. State vs. Payne, 6 Wash. 563. For these reasons I am of opinion that the Eighteenth Amendment and the Statute charged to have been violated were both in full force and effect on the 17th day of January of this year. The claim that the Eighteenth Amendment itself is unconstitutional and void is based upon two grounds, first, because the Amendment is in derogation of the Constitution and not an Amendment at all; and, second, because Congress was without power or authority to submit a conditional Amendment or an Amendment limiting the time within which it must be ratified.

The length of this opinion and the limited time at my disposal forbid an extended discussion of these objections, if indeed such a discussion be called for by this Court. After receiving the approval of two thirds of the membership of both houses of Congress and after ratification by the Legislatures of more than three fourths of the States, the defects in a Constitutional Amendment must be plain indeed before a Court of inferior jurisdiction will be justified in declaring it null and void. No such case is presented here. Briefly stated the contention of the petitioner is this:

An amendment "implied such an addition or change within the lines of the original instrument as will effect an improvement,
23 or better carry out the purpose for which it was framed. Livermore vs. Waite, 102 Cal. 118.

And from this it is argued that inasmuch as the original Constitution was silent on the question of the manufacture and sale of intoxicating liquors there is nothing to be amended or to amend by and therefore the Amendment itself is void.

The term Amend, as defined by Webster, means:

"To change or alter, as a law, bill, motion, or constitutional provision, by the will of a legislative body, or by competent authority; as to amend a charter."

That the Amendment in question changes the original Constitution does not admit of question, and while it does not change any provision relating to this particular matter it does change the instrument as a whole. The Constitution is a mere grant of power to the Federal Government by the several States and any Amendment which adds to or in any manner changes the powers thus granted comes within the legal and even within the technical definition of that term. The Thirteenth Amendment abolishing and prohibiting slavery within the States has been recognized as a part of the Constitution for upwards of half a century. The Amendment in question does no more only the prohibition extends to a different subject matter. It seems to me therefore that the objections are without substantial merit. Again it is urged that the Constitution does not authorize the submission of conditional Amendments. This is no doubt true but it is equally true that the Constitution does not forbid them. The framers of the Constitution could not foresee the form or character of Amendments which might become necessary in the future and wisely left all such questions in the hands of
24 those who might be charged with official duty when the necessity for the change and the character of the change to be made became apparent.

For these reasons I am of opinion that the Amendment in form and substance was entirely within competency of Congress and the several States to propose and ratify and that both the Amendment and the National Prohibition Act were in full force and effect on the day in question.

The petition is accordingly denied.

January 27th, 1920.

(Endorsed:) Filed Jan. 27, 1920. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.)

25 At a Stated Term of the District Court of the United States, for the Northern District of California, First Division, held at the Court-room thereof, in the City and County of San Francisco, State of California, on Tuesday, the 27th day of January, in the year of our Lord, One Thousand, Nine Hundred and Twenty.

Present: The Honorable, Frank H. Rudkin, District Judge.

No. 16763.

In the Matter of J. J. DILLON on Habeas Corpus.

Order Denying Petition for Writ of Habeas Corpus.

Pursuant to opinion this day filed, it is ordered that the Petition for a Writ of Habeas Corpus heretofore submitted herein be, and the same is hereby denied.

26 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16763.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector United States Internal Revenue, Respondent.

Notice of Appeal.

Please take notice that the above-named petitioner hereby appeals to the Supreme Court of the United States from the order and decree rendered and entered in the above entitled cause on the 27th day of January, 1920, discharging the order to show cause why a writ of habeas corpus should not be issued herein and denying petitioner's application for such writ of habeas corpus.

Dated, San Francisco, Jan. 28, 1920.

THEODORE A. BELL,
Attorney for Petitioner.

Receipt of a copy of the above notice is hereby admitted this 28th day of January, 1920.

ANNETTE ABBOTT ADAMS,
Attorney for Respondent.

Filed Jan. 28, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

27 In the Southern Division of the United States District Court for the Northern District of California, First Division.

16763.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector United States Internal Revenue, Respondent.

Petition for Appeal.

To the Honorable Frank H. Rudkin, District Judge:

The above named petitioner, feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 27th day of January, 1920, discharging the order to show cause why a writ of habeas corpus should not be issued herein and denying petitioner's application for such writ of habeas corpus, does hereby ap-

peal from said decree and order to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree and order were based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

THEODORE A. BELL,
Attorney for Petitioner.

28 (*Order Allowing Appeal.*)

Appeal allowed upon giving bond for costs as required by law for the sum of Two Hundred Fifty ($250.00) Dollars.

Dated: January 28th, 1920.

FRANK H. RUDKIN,
District Judge.

(Endorsed:) Filed Jan. 28, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

29 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16763.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector United States Internal Revenue, Respondent.

Assignment of Errors.

Now comes the petitioner in the above entitled matter and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the order and decree made by this honorable court on the 27th day of January, 1920.

I.

That the United States District Court for the Northern District of California, Southern Division, erred in refusing petitioner J. J. Dillon a writ of habeas corpus, as prayed for in his petition herein.

II.

That said honorable court erred in discharging the order to show cause why a writ of habeas corpus should not issue therein.

III.

That said honorable court erred in dismissing petitioner's application for a writ of habeas corpus herein.

THEODORE A. BELL,
Attorney for Petitioner.

Dated January 20, 1920.

30 (Endorsed:) Receipt of a copy of the within Assignment of errors is hereby admitted this 28th day of January, 1920. Annette Abbott Adams, Attorney for Respondent. Filed Jan. 28, 1910. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

31 In the Southern Division of the United States District Court for the Northern District of California, First Division.

16763.

J. J. DILLON, Petitioner,

vs.

R. W. GLOSS, Deputy Collector United States Internal Revenue, Respondent.

Bond on Appeal.

Know all men by these presents:

That we, J. J. Dillon, as principal, and D. W. Keating and Maurice Selig, as sureties, are held and firmly bound unto R. W. Gloss, Deputy Collector United States Internal Revenue, in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to him and his executor, administrator, or successor; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 28th day of January, 1920.

Whereas the above named petitioner has appealed to the Supreme Court of the United States to reverse the order and decree of the above named district court refusing plaintiff's application for a writ of habeas corpus and dismissing his petition.

Now, therefore, the condition of this obligation is such that if the above named petitioner shall prosecute his said appeal to effect and
32 answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

J. J. DILLON.
D. W. KEATING.
MAURICE SELIG.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On the 28th day of January, 1920, personally appeared before me J. J. Dillon, D. W. Keating and Maurice Selig, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said D. W. Keating and Maurice Selig being respectively by me duly sworn, each for himself and not one for the other, says that he is a resident and free holder of the Northern District of California, and that he is worth the sum of two hundred and fifty dollars over and above his just debts and legal liability and property exempt from execution.

J. J. DILLON.
D. W. KEATING.
MAURICE SELIG.

Subscribed and sworn to before me this 29th day of January, 1920.
[SEAL.] C. B. SESSIONS,
Notary Public in and for the City and County of San Francisco, State of California.

33 The within bond is approved both as to sufficiency and form this 29th day of January, 1920.
FRANK H. RUDKIN,
District Judge.

(Endorsed:) Filed Jan. 30, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

34 *Certificate of Clerk, U. S. District Court, to Transcript on Appeal.*

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 33 pages, numbered from 1 to 33, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of J. J. Dillon, Petitioner, vs. R. W. Gloss, Deputy Collector U. S. Internal Revenue, Respondent (On Habeas Corpus) No. 16763, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe of Appellant, and the instructions of the Attorney for Petitioner and Appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on Appeal is the sum of Eleven Dollars and Sixty Cents ($11.60) and that the same has been paid to me by the Attorney for the Appellant herein.

Attached hereto is the original Citation on Appeal issued herein (page 35).

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of February, A. D., 1920.

[Seal of the U. S. District Court, Northern District of California.]

WALTER B. MALING,
Clerk.

By C. M. TAYLOR,
Deputy Clerk.

35 (*Citation on Appeal.*)

UNITED STATES OF AMERICA, ss:

The President of the United States, to R. W. Gloss, Deputy Collector of the United States Internal Revenue, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within sixty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein J. J. Dillon is appellant and you are appellee, to show cause, if any there be, why the decree and order rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank H. Rudkin, United States District Judge sitting in the Northern District of California, this 3rd day of February, 1920.

FRANK H. RUDKIN,
United States District Judge.

36 [Endorsed:] No. 16763. In the Southern Division of the U. S. District Court, Northern District of California. First Division. J. J. Dillon, Petitioner, vs. R. W. Gloss, Deputy Collector of United States Internal Revenue, Respondent. Citation on Appeal. Filed Feb. 4, 1920. W. B. Maling Clerk; by C. M. Taylor, Deputy Clerk.

(Endorsed on cover:) File No. 27,486. N. California, D. C. U. S. Term No. 731. J. J. Dillon, Appellant, vs. R. W. Gloss, Deputy Collector of United States Internal Revenue. Filed February 19th, 1920. File No. 27,486.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted] 251

J. J. DILLON, APPELLANT,

vs.

R. W. GLOSS, DEPUTY COLLECTOR OF UNITED STATES INTERNAL REVENUE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION OF APPELLANT TO ADVANCE.

Comes now the appellant, by his attorney, Theodore A. Bell, Esquire, and respectfully moves the advancement of the above-entitled cause for argument during the present term.

The questions presented for decision on this appeal are as follows, to wit:

1. That the Eighteenth Amendment is not a valid amendment to the Constitution of the United States.

2. That said amendment was neither proposed nor submitted in the manner required by article V of the United States Constitution.

3. That at the time of the alleged offense committed by the appellant, to wit, January 17, 1920, the Eighteenth Amendment was not in full force and effect.

4. That the National Prohibition Act, enacted by Congress for the enforcement of the Eighteenth Amendment, was not in force and effect on January 17, 1920.

5. That the proclamation of the Secretary of State dated January 29, 1919, was prematurely issued, and that the requisite number of State legislatures had not ratified the Eighteenth Amendment at the time such proclamation was published.

The appellant, after being arrested for the alleged violation of the National Prohibition Act, applied to the United States District Court for the Northern District of California for a writ of *habeas corpus*. A demurrer to the petition was filed by the Government, which demurrer was sustained by the District Court and the proceeding dismissed.

On account of the importance of the questions here involved, and considering the fact that other proceedings attacking the validity of the Eighteenth Amendment and the National Prohibition Act are about to be argued before this honorable court, it will undoubtedly expedite the final determination of all of the questions involved in this and other similar cases if this appeal may be argued and presented at an early date.

Counsel for the Government consent to the advancement of this case for argument.

THEODORE A. BELL,
Attorney for Appellant,
1002 Hobart Building, San Francisco.

March 12, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 251.

J. J. DILLON, APPELLANT,

vs.

R. W. GLOSS, DEPUTY COLLECTOR OF UNITED STATES INTERNAL REVENUE.

BRIEF FOR APPELLANT.

THEODORE A. BELL,
LEVI COOKE,
GEORGE R. BENEMAN,
Attorneys for Appellant.

MARCH, 1921.

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Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 251.

J. J. DILLON, APPELLANT,

vs.

R. W. GLOSS, DEPUTY COLLECTOR OF UNITED STATES INTERNAL REVENUE.

BRIEF FOR APPELLANT.

Statement of Facts.

Appellant was arrested on the 17th day of January, 1920, in the city of San Francisco, California, by appellee, a United States deputy collector of internal revenue, and while in custody sued for a writ of *habeas corpus*, alleging in his petition (Record, page 2) that he was the employee of a drayage company and as such was carrying through the streets of San Francisco by truck a cask of wine for

delivery to its owner; that his arrest was for alleged violation of section 26 of title II of the National Prohibition Act of October 28, 1919, that section forbidding the transportation of intoxicating liquors in violation of the provisions of that act. It was averred on petition for writ of *habeas corpus* that all internal-revenue and other laws respecting the wine had been complied with, and that the only ground for the arrest was the alleged violation of the provisions of titles II and III of the National Prohibition Act, and particularly of section 26 thereof (Record, page 2). It was averred on the petition, first that the National Prohibition Amendment was invalid as a deprivation of the police power of the State of California; secondly, that, even if the amendment be valid, it had not become effective on the day of the arrest, by virtue of the failure of two-thirds of the States to ratify as of that moment; and, thirdly, that the petitioner was deprived of his liberty without due process of law. On demurrer to the petition (Record, page 8), the matter was heard before District Judge Rudkin, the validity of the amendment and statute considered on all points, and the demurrer sustained.

Upon denial of the petition (Record, page 14), the petitioner brings this appeal. In this court, motion was made to advance the cause for hearing, and this motion was denied without prejudice.

ARGUMENT.

The Eighteenth Amendment is invalid because of the extra-constitutional provision of the third section of the amendment.

The third section of the amendment is as follows:

> "SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress."

In this provision Congress violated Article V of the original Constitution governing amendments. Article V of the Constitution is as follows:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; *provided*, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Under this article, Congress may propose, or, on application of the legislatures of two-thirds of the several States, may call a convention for proposing amendments. After amendments are thus proposed, they acquire validity as part of the Constitution upon ratification by three-fourths of the legislatures of the States, or by conventions in three-fourths thereof, as the mode may be proposed by Congress.

Congress has no constitutional power to limit the time of deliberation or otherwise attempt to control what the legislatures of the States shall do in their deliberation. Any attempt to limit is extra-constitutional and voids the proposal.

The Legislative History of Section Three.

Section 3 was introduced into the Senate joint resolution as an amendment offered from the floor by the Honorable Warren G. Harding, then a Senator from Ohio. On August 1, 1917, the Senate Joint Resolution No. 17 (introduced by Senator Sheppard) being under debate, Senator Harding called up an amendment thereto as follows:

> "SEC. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, on or before the first day of July, A. D. 1923."

Mr. Harding then said:

> "Mr. President, I have offered the amendment as representing the judgment of a number of Senators on the floor, with a view to placing a limitation on the pendency of the proposed amendment to the Constitution. *I do it because that policy is involved*

> *in my consent to support the pending resolution"* (Congressional Record, 65th Congress, first session, page 5648).

Mr. Harding clearly stated that his vote for the resolution proposing the amendment was conditional on this provision being approved.

Senator Borah (*idem.*, page 5649), Senator Brandegee (*idem.*, page 5650), and Senator Cummins (*idem.*, page 5653) insisted upon the invalidity of the provision as being an attempt, in the act of submitting a resolution proposing an amendment to the Constitution, to alter by mere congressional action the constitutional rule governing constitutional amendments.

Senator Borah (page 5649) said:

> "I would vote for an amendment to change the Constitution of the United States in regard to the machinery provided for the ratification of proposed amendments, because I think there is much merit in the proposition that there ought to be a time within which constitutional amendments should be ratified; but we cannot change the Constitution of the United States as to the machinery by which ratification takes place by the manner in which we submit a particular constitutional amendment. In other words, we cannot provide in the submission a rule for ratification of that particular proposal when there is another existing rule in the Constitution."

That section 3 was a condition of the assent of the Senate to the amendment being approved in the Senate is further demonstrated by at least two other statements appearing in the debate. Senator Vardaman, at page 5659 of the Record,

protested against the provision and stated as his opinion that "it will be eminently unfortunate for Congress to write something into the joint resolution not authorized by the Constitution," and expressed the view that the cause "would not be promoted by accepting this amendment or anything akin to it." The following colloquy occurred:

> "Mr. Stone. Mr. President, may I interrupt the Senator from Mississippi?
>
> "Mr. Vardaman. With pleasure.
>
> "Mr. Stone. The Senator says that he does not believe that a single vote would be added to the final vote for the joint resolution offered by the Senator from Texas by adding to it the amendment proposed by the Senator from Ohio. The Senator ought not to say that, I submit to him, when Senators on the floor and otherwise have given assurance that they would vote for the joint resolution if it were so amended."

At the same page, Mr. Sheppard, who was in charge of the resolution, says:

> "Let me say that on looking carefully into the situation I found that this amendment could be voted on and could in all probability be passed if such an amendment as this could be added. I hope, therefore, that it will be agreed to."

An examination of the debate on section 3 in the Senate (pages 5648-5666) discloses support of the joint resolution conditional upon Congress attempting to impose its limitation upon the State legislatures; and over the protest of members of the Senate, schooled as lawyers, as to the validity of the proposal. It is to be noted that Senator

Cummins during the debate (page 5662) proposed as a substitute an amendment to the Constitution amending article V to limit the period for consideration by the States of proposed amendments to a period of eight years following submission; and Senator Brandegee, at a later date, introduced a joint resolution proposing an amendment of the same substance, it being the view of these Senators that no time limitation could be placed upon deliberation by the States except by prior amendment of article V of the Constitution governing amendments.

Senator Harding's amendment was revised at Senator Sheppard's suggestion and with Senator Harding's approval immediately after the latter called the amendment up so as to make the limitation for deliberation by the States one of six years (page 5649) and the amendment thus revised was adopted by the Senate; and the Sheppard resolution proposing the constitutional amendment and containing the limitation was passed by the Senate (Record, page 5666) by a vote of 65 yeas and 20 nays, with 11 Senators not voting.

In the House of Representatives the Senate joint resolution was reported with three substantial amendments. Aside from transposing the order of the sections, it was provided that the prohibition of section 1 should commence one year after ratification; section 2 was amended to create concurrent power in the Congress and in the several States to enforce the article by appropriate legislation, the Senate having left the enforcement alone with Congress, and section 3 was amended to extend the time limitation upon the State legislatures, which the Senate had fixed at six years, to seven years. This is the present form of the article, and in this form the House passed the resolution on December 17, 1917,

the Senate concurring in the House amendment on December 18, 1917. Senator Borah on that day took occasion (Congressional Record, 65th Congress, second session, page 477) again to state his views as to the invalidity of section 3.

This Court has Not Considered the Point.

In *Rhode Island vs. Palmer* (*National Prohibition cases*), 253 U. S., 350, this court, considering the objections which were then made to the validity of the Eighteenth Amendment, did not have before it the question of invalidity now raised as to the effect of section 3 of the article. The court, in conclusion No. 5, states as follows:

> "That amendment, by lawful proposal and ratification, has become a part of the Constitution and must be respected and given effect the same as other provisions of that instrument."

This conclusion, following conclusions Nos. 1 and 2, considering respectively the question whether Congress should have expressly stated that it deemed the proposal necessary, and the question whether the two-thirds vote in each House need be more than two-thirds of a quorum present, must be treated as limited to the contentions then made as to the validity of the proposal; and no contention was made in argument before the court as to the violation of article V of the Constitution, found in section 3, now presented by the record in this appeal.

The court, in quoting the text of the Eighteenth Amendment preliminary to statement of its conclusions in the Rhode Island case, quotes only section 1 and section 2 and omits entirely section 3. It is submitted that the court has

not given consideration to the effect of section 3, and that its conclusions, as found in the Rhode Island case, proceed as if the 18th article of amendment had been submitted by the Congress without the time limitation attempted by Congress therein upon the State legislatures.

The Effect of Section Three.

The Congress has power, under article V, of its own motion only to propose amendments when two-thirds of both Houses shall deem it necessary. This means that two-thirds of a quorum of both Houses must concur in action, and to this end act within the constitutional sanction and limit found in article V. There is no authority found in the Constitution by which two-thirds of both Houses may submit an amendment, some members assenting only if extra-constitutional terms and conditions are added to what might alone be proposed validly; or under the terms of their resolution may restrict the action of the States in their deliberation thereon; or as in this transaction may submit an amendment as necessary in their judgment only if the States act for ratification within a time limit, or upon any other condition subject to which the Congress makes the submission as then only necessary in their judgment.

Without this extra-constitutional provision, it is impossible to say that two-thirds of a quorum of the House and Senate would have proposed the amendment, and we have the positive statement of Senator Harding that his assent to the amendment was conditional upon the limitation to the States being engrafted upon the proposal; and we have the statement of Senator Stone that Senators on the floor and

otherwise gave assurance that they would vote for the joint resolution if it were so amended; and the proponent of the entire resolution, Senator Sheppard, was for the provision because he had looked carefully into the situation and found that the amendment could be voted on and could in all probability be passed if such an amendment could be added. In other words, two-thirds of the Senate would be for the resolution if it were amended with an extra-constitutional limitation upon the deliberation of the States. It cannot, therefore, be said that if the proposal had been voted on with only the first and second sections present, it would have commanded the affirmative vote of two-thirds of the Senate.

The same taint attended the passage of the amendment in the House, because there what is now section 3 was considered and the limitation changed from six to seven years, and it is impossible to say now that without the attempted time limitation upon the States two-thirds of the House would have assented to the proposal of the amendment. So far as the effect of the provision in the congressional consideration of the amendment is concerned, it is clear that the proposal of the amendment went to the States coupled with an attempted time limitation upon the deliberation of the States, in contravention of the power granted by article V to the Congress, and that without such time limitation the proposal would not have received the assent accorded it by the houses of Congress.

As to the effect of this provision upon the States, the legislatures were confronted with the proposal of an amendment to the Constitution under a time limitation. We print, as Appendix "B," Senate Document 169 of the 66th Congress, Second Session, showing dates of ratification by the States as reported by the Secretary of State, with the dates of noti-

fication to the latter of such ratification. This will be referred to at a later point in the brief, but is now cited to show that as of January 17, 1919, 36 State legislatures had ratified the amendment. The resolution was finally passed in the House and Senate and signed by the Speaker of the House and the Vice-President on December 18, 1917. This means that 36 States had acted on the amendment within one day less than thirteen months after Congress completed the conditional proposal.

The fact that thirty-six States thus hurriedly ratified emphasizes the evil that was accomplished by the limitation, and can in no way be invoked to suggest that the third section became surplusage in view of this result attained so shortly after submission and so well within the seven-year time limitation attempted to be set by Congress. On the contrary, the fact of there being a time limitation tended to destroy any deliberation by the States and to enable the faction which was pressing for ratification of the National Prohibition Amendment to urge immediate indeliberate action in order to avoid the possibility of the time limitation expiring without 36 States having made ratification.

The history of the times discloses, if the court may take judicial notice thereof, that legislators elected prior to the submission by Congress were urged to act forthwith, without awaiting the election of legislators by an electorate aware of the pendency of the congressional proposal, and that in some legislatures ratification was secured without debate, in the precipitate action urged by the faction advocating the amendment. The speed with which the amendment was disposed of by the State legislatures tends to establish the absence of deliberation; and in any view the fact stands that the States were acting in the presence of a limitation fixed

by Congress, violative of the fifth article, in terms unheard of in the history of the country, and contrary to any procedure sanctioned by the organic law, with the very nature and structure of which both the Congress and the State legislatures were dealing.

The Evil of Departure from the Fifth Article Governing Amendments.

Mr. Justice Story, in his treatise on the Constitution, third edition, volume 2, section 1830, says of the fifth article and the amending power in general:

> "The guards, too, against the too hasty exercise of the power, under temporary discontents or excitements, are apparently sufficient. Two-thirds of Congress, or of the legislatures of the States, must concur in proposing, or requiring amendments to be proposed; and three-fourths of the States must ratify them. Time is thus allowed and ample time for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for immediate action. An amendment, which has the deliberate judgment of two-thirds of Congress, and of three-fourths of the States, can scarcely be deemed unsuited to the prosperity or security of the republic. It must combine as much wisdom and experience in its favor, as ordinarily can belong to the management of any human concerns."

Was the Eighteenth Amendment submitted by Congress and considered by the States according to the formula of the

fifth article with the deliberate judgment of Congress and of the State legislatures?

If the assent of Senators and Representatives was secured by a provision restricting the constitutionally unlimited deliberation of the States, and if the State legislatures were then urged to precipitate action by virtue of their being faced by any limitation whatever when the Constitution contemplates none, certainly the proposing authority violated the fifth article as a condition precedent to exercising its function, and the States were put to circumstances of ratification that violated the fifth article.

We are not driven to weigh or measure the quantum of the evil of the violation or to speculate as to whether or not a similar result might not have been reached had the fifth article been complied with. The fundamental thing is that Congress violated the article in the proposal (and the fact is that this violation was the condition of Senators voting for the proposal), and that the States acted under an unconstitutional condition, and that the Constitution itself was not followed in an attempted amendment thereof.

The Constitution is the most inviolable law in the United States. No part is of necessity to be more sacredly safeguarded than its provision for its own amendment. If that provision may be disregarded, if its terms may be made the subject of trade, and departure therefrom be made the channel of proposal by Congress of what would within its terms be not proposed, and if State ratification be subjected to indeliberate haste and uncertainty by the presence of conditions never contemplated in the Constitution itself, then the Constitution is indeed truly violated, not by any act of Congress which is merely void by its invalidity as not

complying with the organic law, but the Constitution itself is damaged and polluted by change of its provisions in defiance of its principles.

No constitutional change can be so necessary, no reform to be secured by amendment can be so vital, no element of haste can be so pressing, as to warrant deviation in the slightest degree from the terms of the fifth article, for if the amending provision be departed from at all, who can say that an amendment adopted by virtue of such departure would have been proposed or ratified had the fifth article been complied with. The degree or substance of departure cannot be made the subject of tolerance or acquiescence; the naked principle alone must be examined; and if departure has occurred in principle, all that was done by Congress or the States must be treated as void.

If departure from the fifth article condemns an amendment, then the Eighteenth Amendment is void, and must be so adjudged; nor is the subject-matter thereof greatly affected, because Congress may immediately propose an amendment to the same end, within the terms of the fifth article, if two-thirds of both Houses concur, and the States, if three-fourths approve, may with due deliberation ratify the same according to Article V.

In the meantime the great system of prior existing local and national laws on the subject will revive again constitutionally to control and regulate intoxicating liquors according to the highly developed standards attained prior to the operation of the defective Eighteenth Amendment.

Condemnation of the Eighteenth Amendment Will Restore the System of Valid Prohibition and Regulatory Federal and State Laws.

Before the Volstead Act, this court had sustained the Webb-Kenyon Act (37 Statutes, 699), which caused the State liquor laws to attach upon arrival of liquors in interstate commerce within the physical borders of the State (*Clark Distilling Co. vs. Western Maryland Railway Company*, 242 U. S., 311).

This court had sustained the so-called Reed Amendment (39 Statutes, 1069), which forbade as a congressional rule of interstate commerce the shipment of liquors for beverage purposes into a State the laws of which prohibited manufacture or sale of liquors therein (*United States vs. Dan Hill*, 248 U. S., 420).

This court had sustained in numerous cases the local State prohibitions and regulations, even to the point of holding a law valid which condemned the mere possession of liquor (*Crane vs. Campbell*, 245 U. S., 304).

Condemnation of the Eighteenth Amendment as bearing in its terms the intrinsic evidence of its violation of the fifth article will restore those Federal and State laws validly existing which prohibited or regulated the liquor traffic possibly more thoroughly than illicit traffic is now being policed as a practical matter by the Federal Government in its national undertaking to enforce by the Volstead Act, the supposed prohibition of the defective Eighteenth Amendment.

The United States have had approximately fifteen months' experience with the operation of the amendment as enforced by the Volstead Act.

That great uncertainty exists as to the meaning to be given to the second section of the amendment conferring concurrent power of enforcement upon the Congress and the States cannot be denied; and this uncertainty has not been removed by the conclusions reached by this court in the Rhode Island case. As Mr. Justice McReynolds stated in concurring in those conclusions, construction of the Eighteenth Amendment creates "bewilderment."

Instead of being sacred as part of the Constitution the Eighteenth Amendment, bearing on its face the indicia of the invalidity of its origin, even if it is not so uncertain in its terms as to be unintelligible, should be condemned as void for departure from the fifth article.

Congress and the States in the light of fifteen months' experience of national prohibition, both as a practical and legal matter, can then proceed to the consideration of a constitutional amendment providing for national prohibition which in form and substance will not only be valid constitutionally, but will avoid the bewildering questions and uncertainties of construction which the present defective amendment presents.

It is submitted that the so-called Eighteenth Amendment is void, that the Volstead Act is consequently void, and that this court should so adjudge, thus remitting the matter to the Congress and the States for valid treatment.

The Referendum and State Reserved Police Power. Points are Waived, as Already Adjudged in This Court.

The record in this case raises an issue that the so-called Eighteenth Amendment had not been ratified by virtue of the pendency of referendum petitions in a number of States,

including California. Counsel waive this point in view of the decision thereof in *Hawke vs. Smith*, 253 U. S., 221.

The record raises the issue that the State of California had not surrendered its reserved police power to regulate or prohibit the transportation of intoxicating liquors and that this reserved right could not be taken from the State without its assent. This point is waived in view of the court's decision on this topic found in Conclusion No. 4, *Rhode Island case*, 253 U. S., 350, wherein the court concludes that the prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes is within the power to amend reserved by Article V of the Constitution. Counsel, for the purposes of this case, consider it adjudged as matter of law that a national prohibition amendment *properly submitted and ratified* would become part of the Constitution and the paramount law of the land.

The Volstead Act Should be Found to Have Become Effective, if at all, January 29, 1920.

Petitioner was arrested on the 17th day of January, 1920, at San Francisco, California. The Volstead Act, 41 Statutes at Large, 305, was passed by Congress over the President's veto on October 27, 1919. Section 3 of title II of that act provides as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be

liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented."

In *Street vs. Lincoln Trust Company, decided Nov. 8*, 1920, this court considered occurrences "prior to the effective date of the National Prohibition (Volstead) Act" but found no occasion in that case to decide what the effective date was.

Congress itself did not know when the constitutional amendment would take effect, although the Acting Secretary of State, on January 29, 1919, had proclaimed the ratification. We print as Appendix "A" to this brief Mr. Polk's proclamation as Acting Secretary of State. Appendix "B" shows that the President, as of December 11, 1919, forwarded to the Senate Secretary Lansing's letter of December 10, 1919, giving a list of the States that had ratified, but this was knowledge reaching the Government at Washington of which the appellant had no notice, and of this communication to the Senate he could not be charged with knowledge. Appellant, in California, could only be charged with knowledge that the State of California had by resolution passed its ratification on January 13, 1919, and could not be charged with knowledge of what the legislatures in other States had done. Nothing in the Volstead Act gave him notice of the date when title II thereof became effective, since that act fixed no date when it would go into effect, whether valid or invalid, under the terms of the amendment. Appellant could not be charged with knowledge of facts which reached the attention of the Secretary of State and were proclaimed by him in part only on January 29, 1919. The proclamation contained no dates, even if petitioner was charged with knowledge of the contents, which would enlighten petitioner as to the date when title II of the Volstead

Act would become operative by virtue of ratification by the 36th State of the constitutional amendment.

Petitioner was engaged in conduct which had been legal. He was arrested as for the illegality of this action by virtue of section 26 of the Volstead Act without provision in the Volstead Act showing that title II would become effective as of a date certain. The most that the act stated was that any person who did the things prohibited after the date when the Eighteenth Amendment went into effect would be punished. By no possibility could defendent have knowledge of the going into effect of the Eighteenth Amendment by virtue of the action of State legislatures, of which he could not be charged with knowledge until the proclamation of the Secretary of State brought the fact to his attention, and it may be conceded, for the purpose of argument, that petitioner could be charged with knowledge of such a proclamation. That proclamation, however, was made the 29th day of January, 1919, that being the only date shown, at which time the Secretary of State announced that the amendment had become valid to all intents and purposes as part of the Constitution.

Petitioner, charged with knowledge of the contents of the amendment, knew that until one year after the ratification prohibition would not become effective. To hold that petitioner violated the Volstead Act as of January 17, 1920, is to charge him with knowledge, not of the action of his own State, and not of the action of Congress, but to charge him with knowledge that a criminal law of the United States became operative on that date by virtue of the action of legislatures of the States of Minnesota, Wyoming, Wisconsin, and Missouri, which States, on a date to him unknown, ratified

the National Prohibition Amendment, and thus set in operation the period of one year at the end of which the amendment would become effective, and against which ratification Congress passed its penal act stated to be operative when the amendment would become effective.

When the *Sixteenth Amendment to the Constitution*, the Income Tax Amendment, was ratified, Congress was careful in the *Act of October 3, 1913*, 38 Stat., 114, to collect the tax for the year 1913 against income accruing from March 1. This is pointed out in *Southern Pacific vs. Lowe*, 247 U. S., 330-336, Mr. Justice Pitney stating that Congress refrained from taxing income prior to March 1, 1913, because the amendment warranting the act had received the approval of the required number of States only in the month of February, 1913.

Congress passed the Volstead Act on October 28, 1919, some months after the alleged ratification, but refrained from stating the date when the amendment alleged already to have been ratified would become effective, and an examination of any Federal act or proclamation could not have advised any citizen that the date when the amendment and Volstead Act would both become effective was the 17th day of January, 1920; on the contrary, the only chargeable notice which can be imputed to any person was Mr. Polk's proclamation of January 29, 1919, stating that as of that date the required number of States had ratified, but furnishing no dates as to those ratifications on which a computation would disclose that complete ratification had occurred January 17, 1919, with consequent operation of the amendment one year later. It is, therefore, submitted that petitioner cannot be charged with having violated, on January 17, 1920, the provisions of

the Volstead Act, dependent for its validity upon ratification of the Eighteenth Amendment, in the absence of congressional resolution or proclamation by the Federal Government publishing that date, with knowledge of which petitioner can be charged as of that date.

Section 205, Revised Statutes, provides as follows:

> "Whenever official notice is received at the Department of State that an amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

Mr. Polk's proclamation, Appendix "A" to this brief, must be treated as the publishing of the fact of ratification under section 205, of which all persons may be considered to be charged with knowledge. Reading section 3 of title II of the Volstead Act, prohibiting certain acts with respect to intoxicating liquors on and after date when the Eighteenth Amendment "goes into effect," in conjunction with the requirements of section 205, Revised Statutes, and the Secretary of State's proclamation of January 29, 1919, thereunder, it is patent that petitioner cannot be held to notice of any earlier date of the ratification of the National Prohibition Amendment than the date of Mr. Polk's proclamation.

CONCLUSION.

Counsel are of opinion that the so-called Eighteenth Amendment is invalid for violation of the fifth article of the Constitution, patent on the face of the alleged amendment, and that it should be so adjudged; and while in no way yielding that contention in the slightest degree, counsel are further of opinion that if the alleged amendment were valid, the penal provisions of title II of the Volstead Act thereunder cannot be charged against persons as effective of earlier date than January 29, 1920.

Respectfully submitted.

THEODORE A. BELL,
LEVI COOKE,
GEORGE R. BENEMAN,
Attorneys for Appellant.

March, 1921.

APPENDIX A.

FRANK L. POLK,
Acting Secretary of State of the United States of America.

To all to whom these presents shall come, Greeting:

Know ye, That the Congress of the United States at the second session, sixty-fifth Congress, begun at Washington on the third day of December, in the year one thousand nine hundred and seventeen, passed a resolution in the words and figures following, to wit:

JOINT RESOLUTION

Proposing an Amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"ARTICLE —.

"SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the ex-

portation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

And, further, that it appears from official documents on file in this Department that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

And, further, that the States whose legislatures have so ratified the said proposed amendment, constitute three-fourths of the whole number of States in the United States.

Now therefore, be it known that I, Frank L. Polk, acting Secretary of State of the United States, by virtue and in pursuance of section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment afore-

said has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 29th day of January, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] FRANK L. POLK,
Acting Secretary of State.

APPENDIX B.

Senate.

66th Congress, 2d Session.

Document No. 169.

Ratification of the Prohibition Amendment.

Message from the President of the United States Transmitting in Response to a Resolution of the Senate of December 2, 1919, a Statement Showing the States and Dates of Their Ratification of the Prohibition Amendment from Official Documents on File.

December 10 (calendar day December 11), 1919.—Ordered to lie on the table and be printed.

To the Senate of the United States:

I transmit herewith a report from the Secretary of State, with an accompanying paper, in response to a resolution of

the Senate requesting him to furnish that body with a statement showing the States which have ratified the Eighteenth Amendment to the Federal Constitution and the dates of such ratifications according to official documents on file in the Department of State.

WOODROW WILSON.

THE WHITE HOUSE,
December 11, 1919.

The President:

The undersigned, the Secretary of State, in response to a resolution passed by the Senate of the United States on December 2, 1919, requesting the Secretary of State "to transmit to the Senate at his earliest convenience a statement showing the States which have ratified the Eighteenth Amendment to the Federal Constitution and the dates of such ratifications, according to official documents on file in the Department of State," has the honor to submit herewith, for transmission to the Senate, if the President approve thereof, a list of States which have officially notified the Secretary of State of their ratification of the prohibition amendment to the Constitution of the United States, showing the date on which it was ratified by each State and arranged in the order that notification was received.

Respectfully submitted,

ROBERT LANSING.

DEPARTMENT OF STATE,
Washington, December 10, 1919.

List of States Which Have Officially Notified the Secretary of State of Their Ratification of the Proposed Prohibition Amendment to the Constitution of the United States, Showing the Date on Which it Was Ratified by Each State, and Arranged in the Order That Notification Was Received.

State.	Date notification was received.	Date of ratification.	Remarks.
Virginia	Jan. 17, 1918	Jan. 11, 1918	By legislature.
Kentucky	Jan. 19, 1918	Jan. 16, 1918	Certificate, date of.
North Dakota	Feb. 8, 1918	Jan. 28, 1918	By governor's approval.
South Carolina	Mar. 12, 1918	Feb. 12, 1918	Do.
Maryland	Mar. 14, 1918	Mar. 12, 1918	Do.
South Dakota	Mar. 27, 1918	Mar. 22, 1918	Certificate, date of.
Texas	Apr. 1, 1918	Mar. 4, 1918	By legislature.
Montana	Apr. 3, 1918	Feb. 20, 1918	By governor's approval.
Delaware	Apr. 4, 1918	Mar. 26, 1918	Do.
Massachusetts	Apr. 30, 1918	Apr. 2, 1918	By legislature.
Arizona	June 10, 1918	May 23, 1918	Do.
Georgia	July 13, 1918	July 2, 1918	By governor's approval.
Louisiana	Aug. 21, 1918	Aug. 9, 1918	Do.
Michigan	Jan. 14, 1919	Jan. 2, 1919	By legislature.
West Virginia	Jan. 17, 1919	Jan. 9, 1919	Do.
Maine	Jan. 18, 1919	Jan. 8, 1919	Do.
Mississippi	Jan. 26, 1919	Jan. 8, 1918	Do.
Florida	do.	Dec. 3, 1918	By governor's approval.
Oklahoma	do.	Jan. 7, 1919	By legislature.
Washington	do.	Jan. 13, 1919	Do.
New Hampshire	do.	Jan. 15, 1919	By governor's approval.
Nebraska	do.	Jan. 16, 1919	By legislature.
Minnesota	do.	Jan. 17, 1919	Do.
Indiana	do.	Jan. 14, 1919	Do.
California	do.	Jan. 13, 1919	Do.
Colorado	Jan. 22, 1919	Jan. 15, 1919	By governor's approval.
Alabama	do.	do.	By legislature.
Oregon	Jan. 23, 1919	do.	Do.
Ohio	Jan. 24, 1919	Jan. 7, 1919	Do.
Illinois	do.	Jan. 14, 1919	Do.
Wyoming	Jan. 25, 1919	Jan. 17, 1919	By governor's approval.
Idaho	do.	Jan. 8, 1919	By legislature.
Wisconsin	do.	Jan. 17, 1919	Do.
North Carolina	do.	Jan. 16, 1919	Do.
Utah	do.	do.	Do.
Kansas	do.	Jan. 14, 1919	Do.
New Mexico	Jan. 29, 1919	Jan. 22, 1919	By governor's approval.
Tennessee	Jan. 31, 1919	Jan. 14, 1919	By legislature.
Iowa	do.	Jan. 27, 1919	By governor's approval.
Vermont	Feb. 1, 1919	Jan. 29, 1919	By legislature.
Missouri	Feb. 4, 1919	Jan. 17, 1919	By governor's approval.
Nevada	Feb. 13, 1919	Jan. 27, 1919	Do.
Pennsylvania	Mar. 3, 1919	Feb. 26, 1919	Do.
New York	Sept. 8, 1919	Jan. 29, 1919	By legislature.

NOTE.—The State of Arkansas ratified January 14, 1919, and so notified, by its legislature, the Secretary of State December 19, 1919, after the above communication to the Senate.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

J. J. DILLON, APPELLANT,
v.
R. W. GLOSS, DEPUTY COLLECTOR OF United States internal revenue. } No. 251.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEE.

On January 17, 1919, the petitioner, appellant herein, filed in the United States District Court for the Northern District of California the petition for writ of habeas corpus set forth on pages 2–5, inclusive, of the record. In said petition he alleged in section 1, paragraph 1 (Rec. p. 2), that he was "unlawfully detained and restrained of his liberty" by respondent, a deputy collector of internal revenue; and in paragraph 1, subdivision g (Rec. p. 3), that respondent "wrongfully and unlawfully arrested petitioner * * * and since said arrest respondent has wrongfully and unlawfully detained and restrained and does now wrongfully and unlawfully detain and restrain" him; and in Section IV (Rec. p. 6) "that

said arrest and detention of your petitioner by the respondent deprives your petitioner of his liberty without due process of law secured to him by the fifth amendment to the United States Constitution."

Respondent appeared on January 23, 1920, and filed a motion to strike out certain portions of the petition (Rec. p. 7), and a demurrer to said petition (Rec. p. 8), alleging, among other things, that said petition did not state facts sufficient to entitle petitioner to the relief therein prayed.

The matter was heard on order to show cause as to the issuance of the writ, on January 23, 1920, when, after oral argument, the matter was submitted on points and authorities to be submitted by January 26, 1920. The minutes of the court of January 23, 1920, show (Rec. p. 9) the following: "The detained herein having been this day surrendered into custody from whence taken, the court ordered that he go at large upon his own recognizance until the further order of the court."

Thereafter, and on the 29th day of January, 1920, the court rendered its written opinion (Rec. pp. 9–14) and entered its order denying the petition of petitioner, and from said order petitioner has prosecuted his appeal to this honorable court.

We submit that there was no error, and that the court properly sustained respondents' demurrer and denied the petition for the reasons hereinafter appearing.

The petition did not allege the petitioner was actually in custody or physically restrained of his liberty.

The only allegations of the petition tending to show any restraint of petitioner by respondent are those set forth above. There must be alleged and shown something more than a constructive restraint and detention; there must be actual confinement or the present means of enforcing it. (*Wales* v. *Whitney*, 114 U. S. 564; *Sibray* v. *United States*, 185 Fed. 401, 404.) And it does not appear from this petition that respondent had either actual custody of petitioner or present means of enforcing his confinement. Mere moral restraint is insufficient. Section 754, Revised Statutes, provides, among other things, that a petition for habeas corpus must show *in whose custody* the prisoner is detained. This petition does not show that he is or was in any custody whatsoever. (*In re Cuddy, petitioner*, 131 U. S. 280.)

That petitioner was not imprisoned, confined, or physically restrained of his liberty at the time he sued out his petition further appears from the minutes of the court of January 23, 1920 (Rec. p. 9), where it is set forth that "The detained herein having been this day surrendered into custody whence taken, the court ordered that he go at large upon his own recognizance until the further order of the court."

It does not appear that there is any proceeding pending against petitioner.

It further appears from the above minute entry that petitioner was discharged by the court from whatever custody he surrendered himself into on

January 23, and that there is no proceeding pending and no subject matter on which the judgment of this court, if the decision of the lower court were reversed, could operate.

Petitioner is at large, and, should a writ of habeas corpus issue, it is obvious that it would be impossible for respondent to comply with its provisions and produce the body of petitioner. (*Ex parte Boez*, 177 U. S. 378, 390.) It is likewise obvious that petitioner has endeavored by a proceeding in habeas corpus to secure an adjudication of legal questions which should have been raised by an orderly proceeding by way of indictment or complaint and demurrer thereto. And it is well settled that a writ of habeas corpus will not issue for such purpose. The usual rule is that a prisoner can not anticipate the regular course of proceedings having for their end the determination of whether he shall be held or released by alleging want of jurisdiction and petitioning for a writ of habeas corpus. (*Ex parte Simon*, 208 U. S. 144, 147.) There is nothing alleged to indicate that this case could not or would not have taken the regular course of criminal proceedings, and nothing is disclosed in the record showing special circumstances justifying a proceeding by habeas corpus or a departure from the regular course of judicial procedure. (*Riggins* v. *United States*, 199 U. S. 547.) The hearing on habeas corpus is not intended as a substitute for the functions of the trial court. (*Henry* v. *Hinkel*, 235 U. S. 219.)

The Eighteenth Amendment is not invalid because of section 3 thereof.

Counsel for petitioner contend that section 3 of the Eighteenth Amendment is invalid and that its invalidity renders the whole amendment invalid. We submit that this court has already passed upon the validity of sections 1 and 2 and has held that the amendment "by lawful proposal and ratification has become a part of the Constitution, and must be respected and given the same effect as other provisions of that instrument." (*National Prohibition cases*, 253 U. S. 350.)

The amendment having been ratified by the requisite number of States within the time limitation provided in section three, it is unimportant whether that section is valid or invalid. It is not to be presumed, as counsel for petitioner intimates, that the intention of Congress in fixing the limitation was to defeat ratification; rather it may be assumed that the proponents of the limitation clause desired the early ratification which was had. But even if section three were held to have been a restriction beyond the power of Congress to impose, it does not follow that its invalidity would render the whole proposition nugatory. Counsel for petitioner arrive at the conclusion that it would, but cite no authorities in support of such proposition. While, as is suggested, Article V of the Constitution contains no express authority for the imposition of such limitation, it is likewise to be observed that it contains no prohibition against such

limitation; and there is much to be said in support of the suggestion of Senator Pomerene that the adoption of the Eighteenth Amendment by the requisite number of States, with section three as a part thereof, modifies to that extent the provisions of Article V of the Constitution. (See Congressional Record, 65th Congress, first session, p. 5650.)

It is an elementary rule of statutory construction that where statutes are void in part, effect may still be given to those portions which are valid, and a court is not warranted in declaring the whole void unless the provisions are so dependent upon one another that they can not stand alone. If they can be divided, as they can here, without defeating the object of the legislation the whole is not rendered void.

This is particularly true where a statute attempts to accomplish two or more objects and the provisions as to one are void; it may still, as to the other one, be valid. And it is a novel proposition to suggest that this court should presume that, because a few Members of the Senate urged a limitation upon the time within which the States might vote upon the question of national prohibition, the Congress as a whole would not have supported the proposition without such limitations. It is true that courts sometimes give some slight consideration to the debates in Congress in determining the construction to be given ambiguous and uncertain portions of a statute, but our attention has been called to no decision supporting the proposition of counsel that this court should

hold the Eighteenth Amendment invalid because "it is impossible to say that two-thirds of a quorum of the House and Senate would have proposed the amendment," without the limitation. Nor can we accept as conclusive counsel's suggestion that speedy ratification of the amendment by thirty-six States indicates that any "evil" was accomplished by the act; if any inference is to be drawn therefrom it would rather appear to indicate that the purpose desired by the proponents of the limitation, to wit, prompt action on the amendment, was accomplished. That the action of the legislatures was favorable to the amendment can not be said to indicate necessarily that the legislatures were not deliberate in their action. This court will surely take notice that legislatures would not be likely to deliberate more than seven years on the proposition; and had they desired more time they all could have spent six more years in considering it if they had so desired. And if the States or Congress are dissatisfied with the results accomplished, the Fifth Article of the Constitution points out the way by which they may as speedily undo what counsel refers to as the "evil accomplished by the limitation."

The Volstead Act became effective January 17, 1920, the effective date of the Eighteenth Amendment.

Section 3, Title II of the National Prohibition Act, which became effective October 28, 1919, provides, section 21, that Titles I and III and certain sections of Title II should take effect immediately, and that the remaining sections of Title II should "take

effect and be in force from and after the date when the Eighteenth Amendment of the Constitution of the United States goes into effect." That date was determined by section 1 of the amendment itself, which reads:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Article V of the Constitution provides that amendments "shall be *valid* to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress."

There is no requirement in the Constitution that its validity shall be determined in any respect by a proclamation of the Secretary of State or otherwise. "Valid" is judicially defined in *Emerson* v. *Knapp*, 75 Mo. App. 92, 97, as "having legal strength, force, and effect, or incapable of being rightfully overthrown or set aside"; and in *Sager* v. *Summers*, 49 Nebr., 459 (68 N. W. 614, 615), it was said: "The word valid means having force; of binding force; legally sufficient or efficacious; authorized by law."

These definitions have been adopted in Bouvier's Law Dictionary, volume 3, p. 3387.

Nor does section 205 of the Revised Statutes, which provides for a proclamation by the Secretary of State, limit or attempt to limit or determine the effective date when an amendment goes into effect. Said section merely provides for a proclamation that same has become valid. It reads:

> Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same *has become valid*, to all intents and purposes, as a part of the Constitution of the United States.

Certainly Congress never intended, by the enactment of this section, to modify the terms of the Constitutional provision that an amendment becomes valid when ratified by the requisite number of States.

The question of whether petitioner herein had or had not notice of the effective date of the amendment or the effective date of the Volstead Act is immaterial, since his ignorance of the law can have nothing to do with a determination of the date of its effectiveness.

We, therefore, respectfully urge that the judgment of the lower court should be affirmed.

ANNETTE ABBOTT ADAMS,
Assistant Attorney General.

MARCH, 1921.

○

DILLON *v.* GLOSS, DEPUTY COLLECTOR OF UNITED STATES INTERNAL REVENUE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 251. Argued March 22, 1921.—Decided May 16, 1921.

1. Article V of the Constitution implies that amendments submitted thereunder must be ratified, if at all, within some reasonable time after their proposal. Pp. 371, 374.
2. Under this Article, Congress, in proposing an amendment, may fix a reasonable time for ratification. P. 375.
3. The period of seven years, fixed by Congress in the resolution proposing the Eighteenth Amendment, was reasonable. P. 376.
4. The Eighteenth Amendment became a part of the Constitution on January 16, 1919, when, as the court notices judicially, its ratification in the state legislatures was consummated; not on January 29, 1919, when the ratification was proclaimed by the Secretary of State. P. 376.
5. As this Amendment, by its own terms, was to go into effect one year after being ratified, §§ 3 and 26, Title II, of the National Prohibition Act, which, by § 21, Title III, were to be in force from and after the effective date of the Amendment, were in force on January 16, 1920. P. 376.

262 Fed. Rep. 563, affirmed.

THE case is stated in the opinion.

368. Argument for Appellant.

Mr. Levi Cooke, with whom *Mr. Theodore A. Bell* and *Mr. George R. Beneman* were on the brief, for appellant:

The Eighteenth Amendment is invalid because of the extra-constitutional provision of the third section. Congress has no power to limit the time of deliberation or otherwise control what the legislatures of the States shall do in their deliberation. Any attempt to limit voids the proposal.

The legislative history of the Amendment shows that without § 3 the proposal would not have passed the Senate. Cong. Rec., 65th Cong., 1st sess., pp. 5648–5666; Cong. Rec., 65th Cong., 2d sess., p. 477.

The same taint attended the passage of the amendment in the House, because there what is now § 3 was considered and the limitation changed from six to seven years, and it is impossible to say now that without the attempted time limitation upon the States two-thirds of the House would have assented to the proposal of the amendment.

The fact that thirty-six States thus ratified within the time emphasizes the evil that was accomplished by the limitation, and can in no way be invoked to suggest that the third section became surplusage in view of this result attained so well within the seven-year limitation attempted to be set by Congress. On the contrary, the fact of there being a time limitation tended to destroy any deliberation by the States and to enable the faction which was pressing for ratification of the amendment to urge immediate indeliberate action in order to avoid the possibility of the time limitation expiring without thirty-six States having made ratification.

The history of the times discloses, if the court may take judicial notice thereof, that legislators elected prior to the submission by Congress were urged to act forthwith, without awaiting the election of legislators by an electorate aware of the pendency of the congressional proposal, and that in some legislatures ratification was secured without

debate in the precipitate action urged by the faction advocating the amendment. The speed with which the amendment was disposed of by the state legislatures tends to establish the absence of deliberation; and in any view the fact stands that the States were acting in the presence of a limitation fixed by Congress, violative of Art. V, in terms unheard of in the history of the country, and contrary to any procedure sanctioned by the organic law, with the very nature and structure of which both the Congress and the state legislatures were dealing. See 2 Story, Const., 3d ed., § 1830.

The National Prohibition Act should be found to have become effective, if at all, January 29, 1920, a year after ratification of the amendment was proclaimed and made known to the public. The proclamation of the Secretary of State must be treated as the publication of the fact of ratification, under Rev. Stats., § 205, of which all persons may be considered to be charged with knowledge.

Mrs. Annette Abbott Adams, Assistant Attorney General, for appellee.

Mr. Justice Van Devanter delivered the opinion of the court.

This is an appeal from an order denying a petition for a writ of *habeas corpus*. 262 Fed. Rep. 563. The petitioner was in custody under § 26 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, on a charge of transporting intoxicating liquor in violation of § 3 of that title, and by his petition sought to be discharged on several grounds, all but two of which were abandoned after the decision in *National Prohibition Cases*, 253 U. S. 350. The remaining grounds are, first, that the Eighteenth Amendment to the Constitution, to enforce which Title II of the act was adopted, is invalid because the congressional

resolution, 40 Stat. 1050, proposing the Amendment, declared that it should be inoperative unless ratified within seven years; and, secondly, that, in any event, the provisions of the act which the petitioner was charged with violating, and under which he was arrested, had not gone into effect at the time of the asserted violation nor at the time of the arrest.

The power to amend the Constitution and the mode of exerting it are dealt with in Article V, which reads:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments of this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What then is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

The proposal for the Eighteenth Amendment is the

first in which a definite period for ratification was fixed.[1] Theretofore twenty-one amendments had been proposed by Congress and seventeen of these had been ratified by the legislatures of three-fourths of the States,—some within a single year after their proposal and all within four years. Each of the remaining four had been ratified in some of the States, but not in a sufficient number.[2] Eighty years after the partial ratification of one an effort was made to complete its ratification and the legislature of Ohio passed a joint resolution to that end,[3] after which the effort was abandoned. Two, after ratification in one less than the required number of States, had lain dormant for a century.[4] The other, proposed March 2, 1861, declared: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." [5] Its principal purpose was to protect slavery and at the time of its proposal and partial ratification it was a subject of absorbing interest, but after the adoption of the Thirteenth Amendment it was generally forgotten. Whether an amendment

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[1] Some consideration had been given to the subject before, but without any definite action. Cong. Globe, 39th Cong., 1st sess., 2771; 40th Cong., 3d sess., 912, 1040, 1309–1314.

[2] Watson on the Constitution, vol. 2, pp. 1676–1679; House Doc., 54th Cong., 2d sess., No. 353, pt. 2, p. 300.

[3] House Doc., 54th Cong., 2d sess., No. 353, pt. 2, p. 317 (No. 243); Ohio Senate Journal, 1873, pp. 590, 666-667, 678; Ohio House Journal, 1873, pp. 848, 849. A committee charged with the preliminary consideration of the joint resolution reported that they were divided in opinion on the question of the validity of a ratification after so great a lapse of time.

[4] House Doc., 54th Cong., 2d sess., No. 353, pt. 2, pp. 300, 320 (No. 295), 329 (No. 399).

[5] 12 Stat. 251; House Doc., 54th Cong., 2d sess., No. 353, pt. 2, pp. 195–197, 363 (No. 931), 369 (No. 1025).

proposed without fixing any time for ratification, and which after favorable action in less than the required number of States had lain dormant for many years, could be resurrected and its ratification completed had been mooted on several occasions, but was still an open question.

These were the circumstances in the light of which Congress in proposing the Eighteenth Amendment fixed seven years as the period for ratification. Whether this could be done was questioned at the time and debated at length, but the prevailing view in both houses was that some limitation was intended and that seven years was a reasonable period.[1]

That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed.[2] An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired,[3] it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any State, without

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[1] Cong. Rec., 65th Cong., 1st sess., pp. 5648–5651, 5652–5653, 5658–5661; 2d sess., pp. 423–425, 428, 436, 443, 444, 445–446, 463, 469, 477–478.

[2] *United States* v. *Babbit*, 1 Black, 55, 61; *Ex parte Yarbrough*, 110 U. S. 651, 658; *McHenry* v. *Alford*, 168 U. S. 651, 672; *South Carolina* v. *United States*, 199 U. S. 437, 451; *Luria* v. *United States*, 231 U. S. 9, 24; *The Pesaro*, 255 U. S. 216.

[3] Article V, as before shown, contained a provision that "No amendment which shall be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article." One of the clauses named covered the migration and importation of slaves and the other deals with direct taxes.

its consent, of its equal suffrage in the Senate.[1] A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two-thirds of the States Congress shall call a convention for the purpose. When proposed in either mode amendments to be effective must be ratified by the legislatures, or by conventions, in three-fourths of the States, "as the one or the other mode of ratification may be proposed by the Congress." Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.[2]

We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps

[1] When the federal convention adopted Article V a motion to include another restriction forbidding any amendment whereby a State, without its consent, would "be affected in its internal police" was decisively voted down. The vote was: yeas 3—Connecticut, New Jersey, Delaware; nays 8—New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia. Elliot's Debates, vol. 5, pp. 551, 552.

[2] *See Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324–325; *McCulloch* v. *Maryland*, 4 Wheat. 316, 402–404; *Cohens* v. *Virginia*, 6 Wheat. 264, 413–414; *Dodge* v. *Woolsey*, 18 How. 331, 347–348; *Hawke* v. *Smith*, 253 U. S. 221; Story on the Constitution, 5th ed., §§ 362–363, 463–465.

in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson [1] "that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.

Of the power of Congress, keeping within reasonable

[1] Jameson on Constitutional Conventions, 4th ed., § 585.

limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require;[1] and Article V is no exception to the rule. Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.

The provisions of the act which the petitioner was charged with violating and under which he was arrested (Title II, §§ 3, 26) were by the terms of the act (Title III, § 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified. Its ratification, of which we take judicial notice, was consummated January 16, 1919.[2] That the Secretary of State did not proclaim its ratification until January 29, 1919,[3] is not material, for the date of its consummation, and not that on which it is proclaimed, controls. It follows that the provisions of the act with which the petitioner is concerned went into effect January

[1] *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326; *McCulloch* v. *Maryland*, 4 Wheat. 316, 407.

[2] Sen. Doc., No. 189, 66th Cong., 2d sess.; Ark. Gen. Acts, 1919, p. 512; Ark. House Journal, 1919, p. 10; Ark. Sen. Journal, 1919, p. 16; Wyo. Sen. Journal, 1919, pp. 26–27; Wyo. House Journal, 1919, pp. 27–28; Mo. Sen. Journal, 1919, pp. 17–18; Mo. House Journal, 1919, p. 40.

[3] 40 Stat. 1941.

16, 1920. His alleged offense and his arrest were on the following day; so his claim that those provisions had not gone into effect at the time is not well grounded.

Final order affirmed.